Petition

FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-294

SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1981

JOHN NAZAR NAZARIAN,

PETITIONER,

vs.

MARY ANN NAZARIAN,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

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QUESTIONS PRESENTED

I

Whether the due process protections of the Fifth and Fourteenth amendments to the United States Constitution are violated by the trial court's disparagment of counsel, threats to counsel, rejection of evidence, creating pressures on counsel to avoid wasting time, creating the appearance of prejudging the issues, and creating the appearance of treating husband and wife unequally.

II

Whether the court of appeal denied petitioner equal protection of law and due process as guaranteed by the Fourteenth Amendment to the United States Constitution when it reviewed the judgment based only on the evidence favoring the judgment, indicated at oral argument that it needn't review the evidence and permits a trial court's finding on credibility to stand without testing its accuracy.

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned Petitioner, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable justices of the Court to evaluated possible disqualifications or recusal.

There are no other interested parties other than those named in the caption of this case and their attorneys of record.

by _____
James R. Goff
Member of the Bar
United States Supreme Court

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JOHN NAZAR NAZARIAN,

PETITIONER,

VS.

MARY ANN NAZARIAN,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

QUESTIONS PRESENTED

I

Whether the due process protections of the Fifth and fourteenth Amendments to the United States Constitution are violated by the trial court's dis-

paragment of counsel, threats to counsel, rejection of evidence, creating pressures on counsel to avoid wasting time, creating the appearance of prejudging the issues. and creating the appearance of treating husbands and wives unequally.

II

Whether the court of appeal denied petitioner equal protection of law and due process as guaranteed by the Fourteenth Amendment to the United States Constitution when it reviewed the judgment based only on the evidence favoring the judgment, indicated at oral argument that it needn't review the evidence and permits a trial court's finding on credibility to stand without testing its accuracy.

The petitioner John Nazar Nazarian respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four entered in this proceeding on January 22, 1981. (See Appendix "A").

OPINION BELOW

The opinion of the court of appeal, was not reported but appears in the appendix hereto. No opinion was rendered by the Supreme Court of the State of California. A copy of the minute order denial is included in the appendix.

JURISDICTION

The judgment of the Court of Appeal for the State of California, Second Appellate District, Division Four was entered on January 22, 1981. A timely petition for Rehearing was denied by the court of appeal on February 11, 1981. A petition for Hearing to the Supreme Court of the State of California was denied on April 1, 1981. (See Appendix "B"). On June 22, 1981, Justice Rehnquist signed an order extending the time for filing the petition for writ of certiorari until August 10, 1981. (See Appendix "D")

This court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

STATUTORY PROVISIONS INVOLVED

Fifth amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property. without due process of law; nor shall private property

be taken for public use, without just compensation."

Fourteenth amendment to the United States Constitution provides in section 1 that:

> "All persons born or natuarlized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent filed for dissolution of her marriage to Petitioner on October 9, 1975. The matter of the dissolution was heard by the Superior Court of Los Angeles County commencing on November 1, 1976. Entry of Judgment of Dissolution and Division of Property was made on December 20, 1977. Petitioner's Motion for a New Trial was denied on January 30, 1978. As a partial result of the division of the community property of the parties, two parcels of property acquired prior to the marriage were made community property and Petitioner was ordered to pay community debt obligations from his

separate property with no right to reimbursement.

The issue during the trial was the source of the funds used to purchase the properties acquired prior to and during the marriage.

In the hearing on the division of property aspect of the dissolution proceedings, the Superior Court of the County of Los Angeles, State of California, overruled Petitioner's constitutional contention that he had been denied a fair trial because the court had denied his trial attorney's request to be relieved as counsel as a result of her conflict with the trial court. (Reporter's Transcript in the state appeal p. 645 in. 27 -p. 651 In 20, Reporter's Transcript hereinafter designated R.T. also see Appendix "C"). Counsel told the court:

> "Well, your honor, I would like at this time to make a motion to be relieved as counsel. I find it impossible to present a proper case for my client in this matter. I think there are some very important and crucial things which should be a part of this record which evidently the court will not let us put in, and I think..." (Rt. p. 645 Ln. 27 - p. 646 Ln. 4).

During the trial the court's actions had infringed Mr. Nazarian's constitutional right to a fair hearing. The trial court had kept up a barrage of disparaging remarks directed primarily at Mr. Nazarian's counsel.

(R.T., p. 40, lns. 11-16 "doesn,t make sense"; R.T., p. 47, lns. 3-8, 14-16 "meaningless"; R.T., p. 59, lns. 5-8; R.T., p. 96, lns. 2-12 "thick as you pretend"; R.T., p. 177, lns. 13-20 "I knew you hadn't done it"; R.T., p. 177, lns. 24-28 "we're waiting"; R.T., p. 199, lns. 26-28; p. 200, lns. 1-2; R.T., p. 215. lns. 14-24 "clearly, neither has Mrs. Boston"; R.T., p. 441, lns. 1-14 "questions are absolutely atrocious"; R.T., p. 640, lns. 12-15 "that approach is commentius conduct").

Besides the disparaging remarks directed by the court to Mr. Nazarian's counsel, the court had continually pressured counsel for being unprepared, for not understanding the theory of proof contained in **See v. See** (1966) 64 Cal. 2d 778, and that if she persisted in bringing in additional evidence he would award attorney's fees, and for wasting the court's time. (R.T., p. 274, lns. 15-19 - fees; p. 584. lns. 20-21 - fees; p. 583, lns. 6 "That's another ten days of trial"; p. 585, lns 20-26 " . . . I don't want him cross-examining everything for the next six weeks. . . " p. 586, ln. 21 "We're talking about another ten days..."; p. 354. lns. 23-28, p. 355. ln.1 "I want you to look at it, not pass it around the room"; p. 398. lns. 8-17 "I'll be in Department 2 next week, and we'll be trying the case maybe a half an hour in the afternoon . . . "; p. 418. lns. 25-26 "wasting our time"; p. 419. lns. 10-12 "cluttering the record... impossible record... waste our time"; p. 422. lns. 23-25 "move

on to the issues that mean something"; p. 441. lns. 1-14 "Oh, come on now, Mrs. Boston... proceed to get to the point..."; p. 528. lns. 25-28 "We're not going to go through each one of these on the court's time, taking the taxpayer's expense..."; p. 529, lns. 10-11 "I already told you, ad nauseum, what I believe the law requires..."; p. 584. lns. 13-14 "dragging this out indefinitely"; p. 585 lns. 12-13 "wasting the court's time"; p. 590, lns. 17-18 "I can't trust you two to meet at your office to get anything done"; p. 630, lns. 13-14 "test the credibility of this court with respect to some of those questions"; p. 647, lns. 23-24" ... if this trial could have ended when it should have, that would never have been before this court...")

At one point the court's exchanges with both Mr. Nazarian and counsel threatened exclusion and/or jail. (R.T., p. 527, ln. 2 - p. 528, ln. 7; p. 815. ln. 13 - p. 816. ln. 2; p. 818, lns. 20-25).

When the trial court was reassigned the trial was relegated to snatches of time that the court could work into its new schedule. However, it was during this time period that Petitioner introduced evidence critical to his theory of the case.

A partial illustration of nine of the remaining 19 trial days may be helpful.

DATE	TIME	R.T.	EXHIBIT
1/19/77	1 hr. 37 min.	568-620	BB, CC
1/20/77	1 hr. 5 min.*	622-651	DD-Income and expenses on property
1/26/77	55 min.	653-678	EE
1/27/77	1 hr. 15 min	679-710	FF, GG, HH, II, JJ, KK, LL
1/31/77	30 min.*	711-729	NN
2/ 1/77	1 hr. 15 min.	730-757	
2/ 3/77	50 min.	758-787	"OO"
2/ 4/77	1 hr. 30 min.	788-830	
2/ 7/77	45 min.	831-857	

*Estimates

Exhibits DD, KK, LL, MM and OO were the crux of Mr. Nazarian's case containing the evidence of income versus expense. Essential to his claim that the property acquired prior to marriage was his separate property.

When Petitioner's counsel had objected to the court's handling of the trial and moved to be relieved as counsel she had noted some examples of the trial courts preventing evidence from being admitted. There had been others, notably the testimony of an attorney consulted by the parties before the dissolution who was not permitted to be questioned regarding statements as to the parties

stated understanding of the status of the properties. (R.T. p. 769, lns. 25-28; p 770 lns. 7-8) The court further rejected a draft post nuptial agreement exhibit "OO" as evidence. (R.T. p. 768 a. lns. 1-28; p. 768 b, lns. 1-4).

A little earlier the trial court had indicated that it would hear what evidence petitioner could offer on the issue of the property's status as community or separate based on the source of the funds used to purchase the property. (R.T. p. 750 lns. 11-24.) However, the court then sustained a series of its own objections to the evidence's admissibility. (R.T. p. 75 lns. 25 — p. 755 ln. 9). Counsel finally gave up.

This all followed the trial court's observation that if it found petitioner's Albany St. property, which was purchased prior to marriage, to be community property then Mr. Nazarian would have no basis for establishing that any other properties were his separate property. This followed because the Albany St. property produced the income Mr. Nazarian was relying on. (R.T. p. 741 ln. 26 - p. 742, ln. 9) The court did find the Albany St. property to be community property.

At another point the trial court told Mr. Nazarian that his offer into evidence of rental receipts to establish the income from Albany St. was not important.

"I am not sure that it makes all that much difference at this stage of the proceedings.. ." (R.T. p. 791, lns. 18-19).

Those receipts had been held unknown to Petitioner by Respondent and her counsel until late in the trial. (R.T. p. 381, lns. 25-27, p. 382 lns. 2-11; p. 778, ln. 4 - p. 783, ln. 1)

Counsel for Petitioner objected to the fairness of the trial at the time she asked the court to relieve her so another attorney could appear.

Petitioner has maintained the unfair trial hearing deprived him of due process of law in the Court of Appeal, Second Appellate District, Division Four and in his Petition for Hearing to the California Supreme Court. The court of appeal said it was a fair hearing and the California Supreme Court denied a hearing.

Further, when the Court of Appeal of the State of California, Second Appellate District, Division Four, considered Petitioner's appeal, it denied him equal protection of the law and due process by refusing to review the evidence of what occurred during the trial or to review the errors in light of the evidence relying instead on a California state procedural rule of civil appellate practice which permits an appellate court to affirm the judgment by looking only at the evidence supporting the trial court's judgment. This is called the "substantial evidence rule".

This acquiesence in the trial court's determination was important to Petitioner because the trial court, in his memorandum of intended decision, stated in part:

> "The testimony adduced as well as the case made by respondent, (Petitioner here) including various witnesses closely associated with him, testifying in his behalf, lacked credibility." (Clerk's Transcript in state appeal p. 171; Clerk's Transcript hereinafter cited as C.T.).

Petitioner attacked the substantial evidence rule in his opening brief pp. 95-98 and in his petition for Hearing in the California Supreme Court. Petitioner indicated the substantial evidence rule as applied by California courts offends the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution. The rule as applied in California has been stated in **Nestle v. City of Santa Monica** (1972) 6 Cal. 3d 920, 925-926; 101 Cal. Rptr. 568, 496 P2d 480:

> "In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party, (Cites Om.) and in support of the judgment. (Cites Om.) All issues of credibility are likewise within the province of the

trier of fact. (Cites Om.) In brief, the appellate court ordinarily **looks only at the evidence supporting the successful party, and disregards the contrary showing.** (Cites Om.) All conflicts, therefore must be resolved in favor of the respondent . . ."

At oral argument the court of appeal went further in stating it had no duty to review the record.

REASONS FOR GRANTING THE WRIT

1. THE SCOPE AND APPLICATION OF THE "SUBSTANTIAL EVIDENCE" RULE AS PROMULGATED BY THE CALIFORNIA COURTS CONFLICTS WITH THE PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION FOUND IN THE FOURTEENTH AMENDMENT.

It has long been recognized that there is no right to appeal. This court said in **Linsey v. Normet** (1972) 405 U.S. 56, 77, 92 S.Ct. 862, 31 L.Ed. 2d 36, 52, that:

" . . . if a full and fair trial on the merits is provided, the due process clause of the Fourteenth Amendment does not require a state to provide appellate review, (cites. om) . . . When an appeal is affirmed, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the equal protection clause."

Petitioner contends that the rubric of appellate review called the "substantial evidence" rule as applied in California offends these standards. There is no review required under the "substantial evidence" test for the fairness of what occurred at the trial. All a reviewing court need do is review the evidence supporting the judgment.

More specifically, Petitioner's defense in this matter was declared by the trial court to lack credibility. Under the "substantial evidence" standard Petitioner has no remedy. The trial judge reviews his own determination on a motion for a new trial. The appellate courts refuse to review the trial court's determination on credibility. The trial judge by that finding insulates his decision from review and the petitioner is prevented from demonstrating by reference to documated evidence the insubstantiality of the trial court's finding.

Deference must be accorded the trial courts determinations on credibility because they see the witnesses testify but a rule which pays deference to such a determination does not require a reviewing court to ignore other evidence which may demonstrate the trial court was in error.

The "substantial evidence" test of California offends the due process protections of the Fourteenth Amendment because it permits a determination without a review of the fairness of the trial and it

permits the reviewing court to ignore evidence of the other side. (cf. **Jackson v. Virginia** (1979) 443 US 307, 99 S.Ct. 2781, 61 L.Ed. 2 560, 573-574).

The equal protection clause of the Fourteenth Amendment is also violated because the California standard capriciously and arbitrarily denies review to those whom the trial court finds to lack credibility and to those whom the trial court decides against.

Petitioner in this case tried to demonstrate on appeal that the trial court was motivated by something other than objectivity, that he denied Petitioner a fair trial, arbitrarily ordered Petitioner to pay community obligations from his separate property (C.T. p. 179; R.T., p.325, lns. 21-28; p. 402, ln. 23 - p. 403 ln. 2; p. 476, ln. 28 -p.477, ln. 4; C.T. p. 2121; R.T. p. 418, lns. 1-20); found property purchased prior to marriage was community property and refused to accept Mr. Nazarian's evidence. Petitioner entreated the appellate court to look at the documented evidence which he presented to the trial court demonstrating the merit of his position and the insubstantiality of the position of Respondent.

Petitioner tried to get the appellate court to examine the record to determine if there was any evidence supportive of the trial court's position. The appellate court declined. At oral argument the acting presiding Justice adamnently refused to look at the record.

The California version of the "substantial evidence" test is unconstitutional as enunciated and as it was applied to Petitioner. Many other States have "substantial evidence" rules which they apply to civil appeals. Those states also probably apply the rules capriciously and arbitrarily.

Petitioners claim that the "substantial evidence" rule violates the equal protection clause presents a federal question. (**American Sugar Refining Co. v. Louisiana,** 179 U.S. 89, 21 S.Ct. 43, 45 L.Ed. 102).

A Writ of Certiorari should issue to review the constitutionality of the California "substantial evidence" rule.

2. DUE PROCESS PROTECTIONS OF THE FOURTEENTH AMENDMENT APPLY TO CIVIL TRIALS AND REQUIRE A FAIR AND COMPLETE HEARING.

A full and fair trial is mandated by the due process clause of the Fourteenth Amendment. (cf. **Linsey v. Normet, supra,** 405 U.S. 56, 77, 92 S.Ct. 862, 31 L.Ed. 20 36, 52). This includes the opportunity to present every available defense. (**American Surety Co. v. Baldwin** (1932) 287 U.S. 156, 168, 53 S.Ct. 98, 77 L.Ed. 231, 239, 86 ALR 298).

The flaunting of these standards by a State trial court requires the issuance of a writ of certiorari to review the judgment.

Petitioner has set forth the circumstances which evidence that he was not accorded a full and fair hearing in which he was able to present every available defense. In fact because of the pressures applied by the trial court to complete the trial, the trial court's apparent pre-determination of what would eliminate Petitioner's contentions i.e. Albany St. as community property; and the trial court's refusal to consider important evidence of the Albany St. property's income because it didn't make "... all that much difference at this stage of the proceedings ..."; it is apparent that Petitioner was denied due process. Similarly, the trial court's expressed belief that husbands should be treated differently may explain the inequities in the judgment. (R.T. p. 681 lns. 10-11). This view, however, offends due process as well.

The kind of proceeding which has been documented here is not unique to Petitioner or to California but it seems to be a phenomenon associated with the vast dissolution litigation which is occurring nationally. The burgeoning case loads of the domestic relations and dissolution courts puts pressures on the courts for quick superficial trials. It breeds malpractice and inequity and certainly is an anathema to reasoned judgment.

A due process brake should be applied to this type of litigation. Petitioner here confronted with a

claim by Respondent to properties Petitioner had purchased prior to marriage attempted to produce an enormous amount of documentary evidence to establish the properties were self sufficient and out produced his community income and expenses to maintain their status as separate properties. However, the trial court pressed for a short trial, was intollerant of the vast amounts of evidence offered by Petitioner and eventually refused to consider the substance of Petitioner's proof.

This kind of trial is disastrous not only to Petitioner emotionally as well as financially, but more significantly because it is not unique it is disastrous to all who must go to the dissolution courts for assistance.

Due process requires a fairness not demonstrated in this record. A writ of certiorari should issue from this court not only to rectify the injustice to Mr. Nazarian but to reaffirm the requirements of due process which must be applied by all courts of justice.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four.

Respectfully submitted,
James R. Goff
Counsel for Petitioner

APPENDIX "A"

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

IN THE MATTER OF THE MARRIAGE OF
MARY ANN NAZARIAN,
PETITIONER, RESPONDENT AND
CROSS-APPELLANT,

VS.

JOHN NAZAR NAZARIAN,
RESPONDENT, APPELLANT AND
CROSS-RESPONDENT.
2 CIV. NO. 56186
(SUPER. CT. NO. D-878,039)

APPEALS from a judgment of the Superior Court, Los Angeles County. Christian E. Markey, Jr., Judge. Affirmed in part; reversed in part with directions.

Max Abrams and James R. Goff for Respondent, Appellant and Cross-Respondent Husband.

Robert L. Wilson for Petitioner, Respondent and Cross-Appellant Wife.

The husband appeals, and the wife cross-appeals, from a judgment in a dissolution proceeding determining the property interests of the parties.[1] With one minor correction, we affirm the judgment as entered.

The parties were married on November 22, 1969; they separated on October 12, 1975. During the marriage, the parties acquired various items of personal and real property, and made payments thereon and on real property purchased by the husband during a prior marriage. The primary dispute herein before us is the extent to which those properties were the separate property of the husband and which were community property, and which obligations incurred for the purchase or for making payments on the properties were community debts and which were separate debts of the husband. A subordinate dispute is over the propriety of an award to the wife of attorney fees.

1. The husband expressly excludes from his appeal the portions of the judgment awarding child support and dissolving the marriage.

I

The trial of the property issues took 19 court days and produced a clerk's transcript of over 3,000 pages and a reporter's transcript of 864 pages. We have been favored with 312 pages of briefs. The evidence was conflicting and subject to conflicting inferences. On many items, the husband, who had managed all of the sundry investments, had either no, or scanty, business records. We cannot say that the trial court erred in the factual findings that it made on the 25 issues raised by the husband in his brief here and on the additional issue raised by the wife on her cross-appeal.

II

The wife testified that she had, in her possession, sundry articles of jewelry, some of which she claimed as gifts to her and some of which, as she testified, were purchased as investments. The findings of fact and judgement make no reference to the jewelry. The wife here agrees that a remand for the purpose of making additional findings, and a judgment on those findings, is required. We so order.

III

It is clear from the portions of the transcript cited to us by the husband that the trial court, in some instances, limited the husband's trial counsel in her efforts to continue examination or cross-examination. The husband here argues, at length, that those ruling indicated a bias by the trial court against that

attorney so extreme as to have affected its determination of disputed issues. The argument is without merit. We can see in the instances cited to us no more than legitimate conduct by the trial court to keep an already lengthy trial from becoming unnecessarily longer. They in no way indicate such bias or anger toward counsel as to justify a reversal.[2]

2. In answer to trial counsel's argument on the bias issue in the trial court, that court said:

"I think basically your problem is that you are asking Mr. Nazarian [sic] to testify from his memory when a memory does not exist. You are asking specific conversations about Bold and other things. He does not even begin to suggest there were specific conversations. One must realize that the court is not blind of what human nature produced, at least during the course of my life, but take each question as it comes up. If you think all the income during the course of the marriage is important, that is fine. I have got more documentation, I believe, than is necessary with respect to income. Wh have tax returns. We have all kinds of schedules. But, Miss Boston, you cannot state things that do not exist. The fact of the matter is that for a number of years, as you [sic] client testified, time and time again, he was not that interested in reading the accounts. He said that six different times. It was only about 1975, shortly before, that he actually became concerned about where each precise dollar went."

On January 20th, after 12 days of trial, the husband's trial counsel sought leave to withdraw, saying:

> "MISS BOSTON: Yes. The fact I do not feel up to continuing this case at this time. I have not — I have a schedule that is unbelievable, and I am too tired to continue with this case at this particular time, and I am too tired."

The trial court granted her a continuance until January 26th and denied the motion to be relieved. When trial resumed on the 26th, counsel appeared and made no further motion to be relieved. We see no error.

IV

The trial court awarded to the wife the wife the sum of $5,000 as attorney fees. The husband attacks that order on the primary ground that the matter of attorney fees was not in issue. While it is true that, in her original petition, filed prior to any trial, the wife had waived attorney fees, the husband, in **his** financial statement had expressly asked for a determination of such fees at trial. Toward the close of the lengthy hearings, the wife's counsel raised the matter of fees, testimony on the financial condition of the parties was offered and received. While it is true that the wife never formally sought to amend her petition, that omission is immaterial. The husband knew of the demand and litigated it; due process requires no more.

The husband also argues that, although the trial court had before it ample evidence of the financial condition of the parties, no evidence was formally presented as to the value of the attorney's services. It is well settled that a trial court, necessarily knowing of the services rendered before it, may draw on its own knowledge to assess the value of those services. (1 Witkin, Cal. Procedure, 2d ed., Attorneys, §97, pp. 106-107).

The judgment is reversed for the sole purpose of making additional findings as to the jewelry and entering a revised judgment based thereon. The judgment is otherwise affirmed. The wife shall recover her costs on appeal. On remand, the trial court shall award to the wife, in addition to attorney fees heretofore awarded, a reasonable sum for the services of her attorney on this appeal and for any additional services in the trial court on remand.

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS.

KINGSLEY, Acting P.J.

We concur:
WOODS, J.
LAIDIG, J.*

* Assigned by the Chief Justice of California.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
San Francisco, California 94102

APR. 1, 1981

I have this day filed Order _____

HEARING DENIED

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2 Civ. 56186

In re: _____ No. _____

Marriage of Nazarian

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vs.

Respectfully,

Clerk

A. Yes.

Q. What did you say to her, and what did she say to you?

THE COURT: Where are we going on that, Miss Boston?

MISS BOSTON: Well, Mrs. Nazarian is claiming there was only $20,000.00 in loans, and we are claiming —

THE COURT: I am not sure she is claiming that at all. The record shows that it has been paid back. It was lost on the stock market. Why are we going over this again?

MISS BOSTON: Because Your Honor asked us whether we would go over some of the items that were here, and one of the items was loans.

THE COURT: Not if they are not in the record.

MISS BOSTON: Maybe I misunderstood the court. It was my understanding that the court asked us to go over some of these.

THE COURT: I said that piece of paper would never get in evidence. If there is anything that is not in the record, please complete your record, but we have now been through the loans. 1971 loan was used to purchase stock has been repaid. Is that correct, Mr. Nazarian?

THE WITNESS: Yes, sir.

MISS BOSTON: I would like a recess, if I may.

THE COURT: All right. We will take ten minutes.

(RECESS)

THE COURT: What more do you anticipate by way of time? Do you have your calendars ready?

MISS BOSTON: Well, Your Honor, I would like at this time to make a motion to be relieved as counsel. I find it impossible to present a proper case for my client in this matter. I think there are some very important and crucial things which should be a part of this record which evidently the court will not let us put in, and I think —

THE COURT: Like what, for example?

MISS BOSTON: I think it has been my view all along, although I know it disagrees with your view, that we have a right to bring into evidence all of the income — all of the community monies that came into this marriage, and we have a right to then go into all of the community debts that were in that marriage, and show that the community income —

THE COURT: Mrs. Boston, that is fine. All you have to do is ask questions and give competent answers.

MISS BOSTON: Except, every time we have asked a question —

THE COURT: You ask about this, and he testifies to it, and the only thing I stopped you from doing is going over it the third time. We have testimony and

papers about income. What is it that isn't on the record? See, what you have in your hand is nice for closing argument, and that is what I will expect that the evidence shows that such and such and such. That is a nice summation, but that is not evidence.

I tried to indicate to you yestereday if there were portions of that that were not already on the record, ask the question, but I did not mean to go over it again and again. The same kind of information.

MISS BOSTON: Well, I am going to have to get into it, Your Honor. The entire income that came in from the mutually held properties, and I am going to have to go into the total expenses that went out. Now, we have not discussed that for the entire seven-year period, and I think it is — we tried to come to some agreement to go over these figures, and since we cannot stipulate to the amounts of the income and the amounts of the expenses, I think it is important that these things be brought before the court, otherwise, how can I argue them, finally argue if they are not before the court.

THE COURT: What question have you asked that seeks competent evidence, and that I have prevented you from asking?

MISS BOSTON: One of them — I am very upset about the position taken by the court on the Alaska, because I think that it was unbelievable that so much money was used to fly somebody down from

Alaska. Yet, when we try — as an owner, when he tries to bring in any evidence —

THE COURT: Miss Boston, the question of who pays for the Alaska trip has not been decided; has it?

MISS BOSTON: No, it hasn't.

THE COURT: Okay.

MISS BOSTON: But, we also do not have all of the information that we would like to bring into Alaska.

THE COURT: Well, ma'am, if this trial would have ended when it should have, that would never have been before this court. You have to conduct yourself accordingly. If you think something has happened that is so important that it requires somebody to testify for your client, to go up, I suggest you just do so. We are not going to be in trial tomorrow. If he wants to fly up and look at it — that is why I said get your calendars. If you are still making a motion to be relieved, if you have any other grounds, please state them.

MISS BOSTON: Well, the grounds are that I think perhaps another attorney might view the matter a little differently than I would and perhaps they would present the evidence that the court wants to hear.

THE COURT: Ma'am, I just want to hear whatever is relevant to the issues, but I don't want to hear it three different times.

MISS BOSTON: Okay. Then, I feel that — with the attitude that exists between Your Honor and myself that I cannot represent my client properly, or that he will —

THE COURT: There is no attitude at all, Miss Boston. I have bent over backwards to try to assist you. I told you what I think the laws are. I ruled on the questions, and objections that were made. As a matter of fact, a number of times objectionable questions slid through without any problem. There is nothing by way of attitude. I expect a lawyer to do his homework and to simply proceed and ask questions which we can — from which we can adduce competent testimony.

MISS BOSTON: Well, I am afraid the court's attitude toward me will be reflected towards my client.

THE COURT: I have no attitude towards you at all. As far as I am concerned, anything you do at all I have no attitude at all. I rule on questions as it comes up. You know we have our own disagreements. I expect you to put — we have disagreements about summaries. Summaries do not come in except on summations. Any facts that you feel are not in, ask him. If that is competent testimony, that will be evidence if he can answer it. I have expressed no attitude, nor do I intend to whatsoever, Miss Boston. I have tried hundreds of times. I

see thousands of lawyers each week. I take each matter as it comes up. I bear no grudge one way or the other. We have had this case a long, long time. I think you could have prepared better. I think you should ask questions more directly.

I think basically your problem is that you are asking Mr. Nazarian to testify from his memory when a memory doesn't exist. You are asking specific conversations about Bold and other things. He does not beging to suggest there were specific conversations. One must realize that the court is not blind of what human nature produced, at least during the course of my life, but take each question as it comes up. If you think all the income during the course of the marriage is important, that is fine. I have got more documentation, I believe, than is necessary with respect to the income. We have tax returns. We have all kinds of schedules. But, Miss Boston, you cannot state things that do not exist. The fact of the matter is that for a number of years, as your client testified, time and time again, he was not that interested in reading the accounts. He said tht six different times. It was only about 1975, shortly before, that he actually became concerned about where each precise dollar went.

MISS BOSTON: But you can construct income by going back to what the normal rental amounts were on the property.

THE COURT: Fine. Is there anything you have been prevented from doing with respect to what the rentals were in any given year?

MISS BOSTON: They aren't in the record yet and even though this may take another ten days, I think it is important to have it come in. Certainly he cannot remember each month, and certainly we do not have written documentation, but as the owner of the property, knowing what the properties were rented for, he can project, if he knows, what the income was, and I think that is relevant, and I think it is competent evidence, and that it should come in.

THE COURT: Well you mean it was not reflected in the tax returns?

MISS BOSTON: No. I do not think it is accurately reflected, and the court has refused to allow us to explain why.

THE COURT: I have not refused to allow you to explain anything. There has been no question that this court has stepped in when there was not an objection.

MISS BOSTON: Well, I attempted to show the change of income tax returns, and the court disallowed that, and —

THE COURT: Well, if I disallowed anything, it was only as to the way you presented it.

MISS BOSTON: What the court actually understood as I understood that, that if the income tax had been filed, they would have been competent because they were not filed. They were hearsay.

THE COURT: What? The income tax returns are not before me as evidence.

MISS BOSTON: I am not talking about those. I am saying that the court refused to allow the last three years, the change of income tax records in that the respondent testified to the fact that he worked with the accountant and re-did them as he had been forced into doing all this accounting, and the court would not allow any of those things to come in.

THE COURT: Are there any other grounds that you want to be relieved as counsel?

MISS BOSTON: Yes. The fact that I do not feel up to continuing this case at this time. I have not — I have a schedule that is unbelievable, and I am too tired to continue with this case at this particular time, and I am too tired.

THE COURT: We are not going to continue tomorrow. We have a weekend. What about Monday.

MR. WILSON: Your Honor, on Monday I am scheduled to commence a trial in Pasadena.

THE COURT: When is the next date both of you can be back here at 2 o'clock?

MR. WILSON: I can be here on the 26th of January.

THE COURT: All right. Motion to be relieved is denied. This matter is continued to the 26th of January.

APPENDIX "D"

SUPREME COURT OF THE UNITED STATES

No. A-1058

MARY ANN NAZARIAN,

PETITIONER,

v.

JOHN NAZAR NAZARIAN,

RESPONDENT.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner.

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 10, 1981.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 22nd
day of June, 1981

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 North Bush Street, Santa Ana, California 92701.

On August 10, 1981, I served the within Petition For Writ of Certiorari on the interested parties in said action, by placing a true copy in each of 4 sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

California Supreme Court
3580 Wilshire Blvd.,
Room 213
Los Angeles, CA 90010

Clerk Court of Appeal
3580 Wilshire Blvd.,
3rd Floor
Los Angeles, CA 90010

Clerk of Superior Court
County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

Robert Leroy Wilson
2040 Ave. of Stars, Ste. 400
Los Angeles, CA 90067

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 10, 1981, at Santa Ana, California.

JACK GALLAGHER

Opposition

Office-Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS
CLERK

NO. 81-294

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN NAZAR NAZARIAN,

PETITIONER,

vs.

MARY ANN NAZARIAN,

RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

ROBERT L. WILSON
2040 AVENUE OF THE STARS, SUITE 400
LOS ANGELES, CALIFORNIA 90067

(213) 277-1467

COUNSEL FOR RESPONDENT

J. GALLAGHER — Printed Briefs (714) 835-6522

QUESTIONS PRESENTED

1. Petitioner was not denied due process of the law during the trial of this action.

2. The Substantial Evidence Rule as applied in California does not conflict with the principles of due process and equal protection found in the Fourteenth Amendment.

3. This court is without jurisdiction to decide the issues raised by the petitioner.

2. The substantial evidence rule as applied in California does not conflict with the principles of due process and equal protection found in the Fourteenth Amendment.

3. This Court is without jurisdiction to decide the issues raised by the petitioner.

TOPICAL

1. Petitioner was not denied due process of the law during the trial of this action. 1
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I.

PETITIONER WAS NOT DENIED DUE PROCESS OF THE LAW DURING THE TRIAL OF THIS ACTION.

Counsel for Petitioner has gleaned the 875 page Reporter's Transcript in this case and cited, out of context in many instances, various statements made by the Trial Judge during the course of trial and argues that the court suffered a loss of objectivity, applied pressure on counsel for MR. NAZARIAN and failed to present MR. NAZARIAN's case for him, in those instances where MR. NAZARIAN's counsel failed to frame appropriate questions to disclose the relevant testimony.

Counsel for Appellant cites two instances (R.T. p. 40, lines 11-16 and R.T. p. 47, lines 3-8, 14-16) where the witness stated she did not understand a question asked by counsel for MR. NAZARIAN. In one instance the Trial Judge stated that the question didn't make sense and in the other, the Trial Judge said that the question was meaningless. Such statements do not demonstrate a loss of objectivity.

Counsel next cites the following:

"Q (By MS. BOSTON) How much was actually paid to Mr. Terry?

THE COURT: Mrs. Boston, would you please leave that alone and get to valuation? And I really don't want to remind you again."

(RT 59:5-8)

However, Counsel fails to cite what followed immediately thereafter, which was:

"MS. BOSTON: Well I would think that the purchase price, or the total purchase, would have—

THE COURT: Well, then, ask what the total purchase price is.

Q BY MS. BOSTON: What was the total purchase price of the property on the 40-acre parcel?"

(RT 59:99-14)

Counsel next refers to RT p. 96:2-12. During the proceedings on Wednesday, December 15, 1976, it had been agreed that JOAN KNOX, a real estate broker, would be called as MARY ANN NAZARIAN's witness at the beginning of proceedings the following day. At the commencement of proceedings on Thursday, December 16, 1976, MS. BOSTON advised the Court that she had a witness to testify as to the value of the Washington property and requested that he testify out of order. When the Court

suggested that he return in the afternoon and that the trial proceed as planned, MS. BOSTON became argumentative, and the following discussion occurred:

"THE COURT: Good morning.

MR. WILSON: Good morning, Your Honor.

MS. BOSTON: Good morning, Your Honor.

Your Honor, I wonder if I might have one request? We have a witness to testify as to the value of the Washington Street property. And he has been in the hospital, and he's not too well, and he's in court now. And we wondered if when Miss Knox goes on, she could testify, first, to the Washington address, and then we could put him on so he could be released this morning also.

THE COURT: I do not know if that solves our problem. What is the time with respect to — what is your witness's name?

MR. WILSON: Miss Knox. She just had this morning available.

THE COURT: Yes, that's the problem. Can he come back at 1:30, 1:45?

MS. BOSTON: Well, he's in court now, and he is not that strong.

THE COURT: Mrs. Boston, I don't understand why you brought him down here at all today. We made special arrangements yesterday to have Miss Knox here and take care of that this

morning. If you want me to cut your cross-examination short, fine. But, see, that's what ultimately happens. We made arrangements to have her called and get rid of her today because she could not come back.

MS. BOSTON: That's right, but it was my understanding that we were going to talk about the values on the —

THE COURT: Mrs. Boston, please. Now, you're not as thick as you pretend to be. We absolutely stated that we were going to take up all of Mrs. Knox at one time. I specifically asked that you put everything on a schedule. But I will allow her to be cross-examined and finish her testimony this morning and get her excused. Now, can he not come back?

MS. BOSTON: Let's just take the testimony as it occurs.

THE COURT: Well, now, we are not going to take it as it occurs. We're going to take the testimony of the young lady, and we're going to take cross-examination, and then she's going to be excused. Now, why have him sit here if he's not feeling well?

MS. BOSTON: So that he will be ready as soon as we start to talk about the value of Washington Street.

THE COURT: He's free to sit in to listen to

anything he wants, but I don't intend to be responsible for his health. It will be much better, as far as I'm concerned, that he come back probably tomorrow and rest today. But he's your witness, not mine. We'll proceed with Miss Knox as to anything she has to say about all properties, with complete cross-examination. And I'd suggest you try and corner in advance, Mrs. Boston—if you have somebody, so he can make special arrangements. You've been an experienced lawyer for a period of time now. Give the court the same consideration that you expect yourself. All right. We'll proceed."
(RT pp. 95, 96)

The Court's comments certainly do not demonstrate a loss of objectivity.

The next "exchange" referred to is on p.177 of the Reporter's Transcript.

Counsel for MARY ANN NAZARIAN was about to read into evidence, portions of the testimony from the deposition of MR. NAZARIAN.

Prior to permitting counsel for MARY ANN NAZARIAN to do so, the Court asked MS. BOSTON if there were any corrections to the portion to be read into evidence. She stated there were some corrections.

The following discussion occurred between Court and counsel:

"THE COURT: Do you have that in front of you?

MS. BOSTON: I do, Your Honor.

THE COURT: Are there any corrections to that portion?

MS. BOSTON: I don't think the original has been signed. There are some corrections on page 19, and I don't believe that counsel has laid any foundation for the taking of this deposition at this point.

THE COURT: Laid any what?

MS. BOSTON: Laid any foundation to be asking questions from the deposition.

THE COURT: You mean because of your not filing the original with the court?

MS. BOSTON: I wasn't asked to file an original with the court.

THE COURT: Ma'am, you should do that the first day of trial, signed and filed. And you want your client—that is why I'm asking you, because I knew you hadn't done it. Now, do you want your client to take time right now and to read every page and sign it?

MS. BOSTON: No.

THE COURT: Or do we stipulate that it can be used as signed, corrected and filed?

MS. BOSTON: I will stipulate that it can be done.

THE COURT: All right. Then read the corrections in the record right now.

MS. BOSTON: On page 19 —

(Pause.)

THE COURT: We're waiting, Mrs. Boston.

MS. BOSTON: I'm sorry. I don't think that this is a correction. I think these are just other notations that were written on the side.

THE COURT: Proceed, Mr. Wilson."

(Rt p.177 Lns. 1-28, p.178 1-14)

These comments do not demonstrate a lack of objectivity. Quite the contrary, without objection by MS. BOSTON, the Trial Judge, prior to permitting the deposition testimony of MR. NAZARIAN to be introduced, inquired of his counsel if she had any corrections to make.

The next comment cited is from R.T. 199-200.

That incident occurred when Court resumed Friday afternoon, December 17, 1976, when MS. BOSTON again decided to call another witness out of order.

In the morning counsel for MARY ANN NAZARIAN had been questioning MR. NAZARIAN when the Court recessed for lunch.

When the Court reconvened the following discussion occurred:

"THE COURT: Are we not resuming with Mr. Nazarian?

MR. WILSON: Yes.

MS. BOSTON: Your Honor, I would like to ask one favor of the court. And that is that we've had Mrs. Lemus here for a couple of days. She cannot testify starting next week.

THE COURT: I thought she was on call.

MS. BOSTON: Her only testimony would be very short. It would only go to her management of the Albany apartments. We could not put her on the day — because we were only talking value. But if we wait unit the normal time to put her on, it would go into next week.

THE COURT: Have you discussed it with Mr. Wilson?

MR. WILSON: No.

THE COURT: Really, I don't know why you two don't work something out. Why don't you give each other the common courtesy which you would expect to be given you? All morning you have had documents available to you; you don't exchange them; I have to make you work at the noon recess. Now, you've known well in advance to tell Mr. Wilson those things before court convenes, and I expect the same of Mr. Wilson. Do you have any objection, Mr. Wilson?

Mr. Wilson: No, Your Honor.

THE COURT: All right. Now, let's get it over with. From now on, will you please, Mrs. Boston, conduct yourself as you would expect counsel and the court of the Superior Court of Los Angeles to conduct herself or himself. Don't wait until the last minute." (R.T. 199:4-28; P. 200:1-2)

The Court permitted MS. BOSTON to call her witness out of order. That is not evidence of a loss of objectivity or denial of due process to Petitioner.

Counsel for Petitioner next cites from p. 274 of the Reporter's Transcript.

The entire discussion on that point commenced on page 272, line 15 of the Reporter's Transcript and is as follows:

"Q All right. Now, directing your attention to 1968, you acquired an interest in certain property located at Albany Street?

A That is correct.

MR. WILSON: Your Honor, at this time, I'd like to offer into evidence as petitioner's 21 a copy of a corporation grant deed from Litton Savings and Loan Association to Helen Z. Babikian, an unmarried woman, to an undivided one-half interest, John Nazarian and Kathleen Nazarian, husband and wife, joint tenants to an undivided one-half interest, dated April 9, 1968. previously

marked as petitioner's exhibit 6 for identification on 10-7-76.

THE COURT: What happened on 10-7-76?

MR. WILSON: Pardon? That was marked as an exhibit to the deposition of Helen Babikian.

THE COURT: Oh, I see.

MR. WILSON: Which was taken on that date, and that's the only copy of the document that I have.

THE COURT: Any objection?

MS. BOSTON: Yes I'd like to have it authenticated either by Mr. Nazarian, if he can, or by Helen Babikian when she's called as a witness.

THE COURT: What are they going to authenticate?

MS. BOSTON: Well, in my looking at the grant deed, I don't know whether it's the original or not. And I think someone who knows the grant deed should say whether it's a true copy, if they can.

THE COURT: They don't sign it. It's the person from Litton that — all I need is certified copy. Do you want to get it cetified at the County Recorder's office, Mr. Wilson, if that's not certified? There is no way that they can authenticate it. They don't sign it.

They just have their names on it, Mrs. Boston.

MS. BOSTON: Except they could identify as to whether it's the document that they received. And perhaps this witness can.

THE COURT: Mark it for identification, 21.

MR. WILSON: Thank you.

Q. BY MR. WILSON: Mr. Nazarian, I show you a copy of a grant deed, dated April 9, 1968. I ask you if you received the original of that deed, or a copy of a deed, in connection with your acquisition in an interest in the Albany Street properties in 1968.

A. I cannot recall, Mr. Wilson. I may have. I cannot recall. Again, for the first time in my life, I'm looking at the documents and the checks. This is a possibility. That is all I can say, because at that date — about that date, I bought that property.

MR. WILSON: Your Honor, I'd like to make a statement. We had some discussions in chambers, and it was my understanding that there was no real dispute to the date that the property was acquired or the manner in which title to the property was held. And I proceeded on that assump-

tion. Has I known that counsel was going to require certified copies of every deed pertaining to each parcel of property, and that there would be a —

THE COURT: I agree with what you're saying, but if they're requiring it, you know — I can only request for fees. And Mrs. Boston and Mr. Nazarian better have that in mind when you put him to the extra trouble and expense that's unnecessary.

MS. BOSTON: Your Honor, we agreed in chambers that there were no issues to title.

THE COURT: You do not have to tell me what you agreed to, Mrs. Boston. The questions before us now is whether or not that document can be received.

MS. BOSTON: Your Honor, I'd like Mrs. Babikian to be able to identify it.

THE COURT: Have you read her deposition?

MS. BOSTON: Well, I believe that she has the deposition. Yes.

THE COURT: Is there any question that at the deposition but that was a true copy of what it purported to be?

MR. WILSON: I might add, Your Honor, that in connection with that deposition, there is a subpoena duces tecum asking

her to bring specific documents. And she was the one that brought the copy of the deed — the deed from which that was copied.

THE COURT: Were you there Mrs. Boston?

MS. BOSTON: I was there, but Mrs. Babikian has the originals with her. She's going to be called as a witness. She can authenticate them, not I. But I have no objection to them coming in as long as Mrs. Babikian is called as a witness an can identify them and explain —

THE COURT: I don't know if she's going to be called or not. We're faced with that question right now. And if you have some objection, put it on the record.

MS. BOSTON: I have no objection except for the fact that I feel that the document should be verified by Mrs. Babikian. But I have no objection to it coming in." (R.T. 272:15 - 275:20)

Counsel for Petitioner next cites from the Reporter's Transcript p. 584 lines 20-21. He has extracted 3 lines from a discussion that commenced on p. 581 and terminated on p. 593 of the Reporter's Transcript regarding the preparation and presentation of schedules of income and expense during which the Court explained in detail what he expected of counsel for both parties to do.

Counsel for Petitioner cites testimony regarding MR. NAZARIAN's living expenses for 1970 from pages 527 and 528 of the Reporter's Transcript. The entire discussion was as follows:

"Q BY MS. BOSTON: Can you tell me what your living expenses were during the month of January 1970?

A Well, since we're asking 1970, I'm going to read you some of the checks, and I'm also going to ask you to consider the food we're eating and the car, we're spending on gas, and so forth.

THE COURT: Let's just answer the question.

What were your living expenses, if you know, in January, 1970?

THE WITNESS: Your Honor, believe me I'm not a machine. I swear I am not a machine.

THE COURT: But it's your attorney that's asking the question.

THE WITNESS: Yes, and that is the only way I can answer.

THE COURT: All right.

THE WITNESS: I will read some of the checks. I will give an idea, and that's all I can do, and that's all I will be able to do.

THE COURT: Mr. Nazarian, I would su-

ggest if you cannot answer the question, you simply say I cannot answer the question.

THE WITNESS: I can, sir, but just taking one at a time.

THE COURT: Mr. Nazarian, if you argue with me, you're going to be sitting out in the hall.

Do you know what your living expenses were in 1970, in January?

MS. BOSTON: Just read — if you have any checks that will substantiate or you know any of the —

THE COURT: We have —

MS. BOSTON: Can you —

THE COURT: Excuse me, Miss Boston. I'm not going to tolerate your telling the witness what to do. You ask questions. If he cannot answer them, his best answer is I don't know. If you ask some other question with respect to checks, fine, I'll take an answer to those questions. But when you ask what your living expenses were, either I want the number, or I don't know, or an answer that's responsive to the question. So your questions are as much a problem as the answers that he would like to give.

Q BY MS. BOSTON: Do you have any records of checks that would indicate what your living expenses were in January of 1970?

A Yes, I do.

Q Would you read or would you tell us what your living expenses were?

THE COURT: Wait a minute. Are the checks before me?

THE WITNESS: You have it in your —

Q BY MS. BOSTON: Do you have records of the checks?

A Yes, we have those in the courtroom, and then I have recorded by number and amount and to whom it was paid right in front of me.

Q All right. From your records, could you tell us what the living expenses were?

A Okay. I hope somebody has an adding machine. There is Pacific Telephone, 10.35; Sears, 6.96. Jack Megerdichian, $10.

THE COURT: Well, I'm not going to take this. If you want to take the time to go add them up, that's fine. But, Mrs. Boston, we're not going to go through each one of these on the court's time, taking the taxpayers' expense. If you're going to run through some summaries, run through them. If you have some checks you want put in evidence, put those in evidence. I quite frankly doubt the relevance of putting in the living expenses. The question is whether or not any community property moneys went into the Albany account and how you verify that. I

have no doubt they had living expenses. No one's contesting that at all.

MS. BOSTON: Your Honor, one of the contentions that we've had in this case is that you can also prove —

THE COURT: Look! I already told you, ad nauseam, what I believe the law requires. And if you are not able to prove where the money that came in—see, we're talking about the source of the moneys that went into the Nazarian apartments account, and the checks that went out, aren't we? Because there's no question about the other account being community, correct?

MS. BOSTON: Or having separate properties put into it.

THE COURT: For which no one reimbursement is allowed, at least on the state of the record at the moment. So we're really talking about the Nazarian account. And what we need is some documentation to show the source of the moneys that went in there, or some proof, and the checks that show what came out of there."

(RT 526-24–529-23)

A similar analysis of the remaining statements of the Trial Judge quoted by counsel for Petitioner, and the context in which they were made together

with remarks which preceded and followed those remarks quoted clearly establishes an atmosphere in the Courtroom significantly different from that which counsel for Petitioner seeks to depict through his isolated and often incomplete quotations.

A review of the entire 857 pages of the Reporter's Transcript clearly demonstrates that Petitioner's contention that he was denied due process as a result of the trial court's loss of objectivity and pressure's on counsel is without merit.

Counsel for Petitioner further asserts that:

> "Similarly, the trial court's expressed belief that husbands should be treated differently may explain the inequities in the judgment. (R.T. p.681 Ins. 10-11). This view, however, offends due process as well."
> (Petition For Writ of Certiorari, p.16.)

The reference to the Reporter's Transcript pertains to a discussion which occurred between MR. NAZARIAN's trial counsel and the trial judge when MS. BOSTON announced that she was calling a former attorney of MR. NAZARIAN to testify in rebuttal to certain statements contained in a declaration filed by counsel for MARY ANN NAZARIAN in support of an application for an award of attorney's fees. The entire discussion was as follows:

> "The COURT: You are talking about Mr. Edwards?

MS. BOSTON: Yes, while he was in court there was a document filed by Mr. Wilson yesterday that made reference to Mr. Edwards and since it is a part of the record, I would like Mr. Edwards to testify to some of the things alleged to have taken place in his office.

The document file, evidently is supporting document of Mr. Wilson, going to our fees.

THE COURT: It is a declaration with respect to fees.

MS. BOSTON: Yes, and reference is made thereto to Mr. Edwards, and I would like Mr. Edwards to clarify for the record what did happen under the circumstances.

THE COURT: What are we talking about?

MS. BOSTON: We are talking about page 2 of the document filed yesterday, called, Declaration of Robert L. Wilson, in response to Declaration of Lucille J. Boston.

THE COURT: We keep fragmenting this thing. Is there any reason we can't proceed now?

It's with respect to the issue of fees?

MS. BOSTON: Yes, and to Mr. Wilson's allegation on his previous documents, that more time was spent because of the difficulty in obtaining records, and we have testimony to the effect by Mr. Edwards, that those statements are not true.

THE COURT: Counsel, we are here to try a case based on competent evidence. I will not accept declarations in lieu of competent evidence. The—what we occasionally do with respect to fees is allow the attorneys to put in a declaration, subject to cross-examination. I dont intend to get into any collateral matters.

MS. BOSTON: That wasn't my intent, I just had a couple of questions to ask him as to what transpired as to the meeting that took place in his office, since I was not counsel at that time.

THE COURT: What is it relevant to?

MS. BOSTON: Relevant to the high amount of fees that Mr. Wilson is requesting and as to which party pay the fees. I believe the implication is that if Mr. Nazarian did not cooperate and did not submit documents, then there might be some justification for having Mr. Nazarian pay a portion of the fees.

Whereas, if the opposite is true —

THE COURT: I thought this was in response to your declaration about your fees.

MS. BOSTON: But it goes into discussing something that happened while Mr. Edwards was the attorney of record. He was the attorney before I came into the case and therefore I was not present when the incident described here took place, and Mr. Edwards could file a document, that would be fine, but I thought while he

was here, since I am going to have to answer —

THE COURT: I don't care if he files a document or not. I will accept that if you agree it comes in as competent evidence. I am not going to get off on trying to impeach something that isn't competent at the moment, by competent evidence.

MS. BOSTON: Well, could we have —

THE COURT: The request as I indicated, the Court will, on occasion accept declarations from each attorney, subject to their being cross-examined as to the amount of their fees.

In this instance Mr. Wilson is requesting some fees. You probably want some consideration with respect to the same and husband's position is a little different from the wife's, on occasion, but I don't—the mere fact he submits and files a declaration, doesn't mean that the Court is going to consider it at all, with respect to anything.

MS. BOSTON: Well —

THE COURT: We are here to take competent evidence and competent evidence only.

MS. BOSTON: That's right, and that's why my feeling was that a declaration may not be considered competent if it was filed with the final argument and while Mr. Edwards was here in court, it would just take a minute or two to —

THE COURT: The only trouble is, I have never

found anything that takes a minute or two. Is this Mr. Edwards here?

MS. BOSTON: Yes.

THE COURT: Come ahead, Mr. Edwards.

MR. EDWARDS: Am I being called to testify, Your Honor?

THE COURT: Apparently."

(RT 679 ln. 3 to 681, ln. 28.)

Thereafter, MS. BOSTON questioned Mr. Edwards regarding the production of documents for review by counsel for MARY ANN NAZARIAN.

Petitioner isolates the statement "husband's position is a little different from the wife's" (R.T. p.681 Lns. 10-11) made by the Trial Judge and labels it as "the trial court's expressed belief that husbands should be treated differently."

II.

THE SUBSTANTIAL EVIDENCE RULE AS APPLIED IN CALIFORNIA DOES NOT CONFLICT WITH THE PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION FOUND IN THE FOURTEENTH AMENDMENT.

Attached as Appendix "A" are the Findings of Fact of the Trial Judge which were affirmed on appeal.

In his brief to the Court of Appeal of the State of California Second Appellate District, petitioner presented the following argument:

"A NEW TRIAL SHOULD BE ORDERED IN THIS CASE BECAUSE THE TRIAL COURT'S ERRONEOUS CONCLUSION OF MR. NAZARIAN'S CREDIBILITY UNFAIRLY AFFECTED THE JUDGMENT.

In this case the trial court, in his memorandum of intended decision, stated in part:

'The testimony adduced as well as the case made by respondent, including various witnesses closely associated with him, testifying in his behalf, lacked credibility.'

(C.T., p.171)

Mr. Nazarian has demonstrated what he believes motivated this conclusion by the trial court, i.e., bias engendered through the trial. (See Issue I.)

However, the above noted statement by the trial court placed an enormous burden upon husband's attempts to vindicate in this appeal the injustice which occurred in the trial court.

There is no disputing the genesis of that burden:

Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court. (Witkin, **California Procedure,** Appeal §245, p.4236.)

A part of this burden is the policy to limit review because of the trial court's ability to observe the appearance and general bearing of the witnesses. (Witkin, **California Procedure,** Appeal §245, pp.4238-4239.)

Notwithstanding these policies, Mr. Nazarian has demonstrated in this case significant evidence of the trial court's lack of objectivity (Issue I), its abuse of discretion in finding Albany and Alaska as community property (Issues II and III), its abuse of discretion in characterizing loans (Issue IV), denying reimbursement (Issue V), equalizing the division of $1,000 (Issue VI) and ordering payment of attorney's fees (Issue VII).

Mr. Nazarian believes it is necessary that this Court reaffirm the exception to the substantial evidence rule that when as here there is evidence of demonstrated bias and abuse of discretion, this Court must examine the entire record to determine the validity of the judgment.

In **Wilson v. Manduca** (1965) 233 Cal. App. 2d 184, 187, the Court noted in reversing the trial court:

> '... **Herbert v. Lankershim**, 9 Cal.2d 409... stands for the general proposition that when there is a close question as to the correctness of the basic conclusion of the trier of fact ... an appellate court should investigate with great particularity the entire record to ascertain whether or not there is any error in the court's ruling which might lead the finder of fact to reach such a conclusion.' (See also Witkin, **California Procedure**, Appeal §291, pp.4277-4278.)

The substantial evidence rule and the procedure by which the trial court reviews its own alleged errors on a motion for new trial tend to insulate the trial judge who has been temporarily blinded to the justice of a particular case. In this situation the reviewing court should have the duty to ascertain whether the trial court's conclusion re credibility is borne out by independent evidence and/or the trial court has acted in good faith to ferret out the truth on its own in teh trial record.

Here, in addition to the conclusion re-

garding Mr. Nazarian's credibility, there are demonstrated instances of the trial court's unobjective treatment of husband and his counsel. There are instances as noted above wherein the trial court failed to follow the law in dividing the property of the parties. These errors will require reversal in this case. However, in the instance when these (sic) evidence of unobjective conduct are not present, a rule of review like that suggested here is necessary.

This case especially calls for the application of such a searching analysis. Beside the trial (sic) court's specific questioning of Mr. Nazarian's credibility, it acknowledged questions as to wife's credibility as well. (C.T., p.171). In such a situation the trial court is in danger of basing its judgment on entirely subjective considerations.

However, the Court's examination of the record applying the suggested rule noted above will reveal that there is no independent evidence of Mr. Nazarian's being untruthful. (Cf., wife's testimony re Albany receipts — see Issue VIII; wife's testimony she didn't maintain a dairy — R.T., p.364, ln. 8 — p.365, ln. 26). A close examination of the records submitted below will not refute

Mr. Nazarian's claims, nor will it sustain the trial court's subjective judgment as to his credibility.

Although the trial court intensely examined Mrs. Lemus concerning her testimony of Albany income (which figures were later essentially corroborated), the trial court would neither question witness Boyajian relative to the parties' intentions with regard to the property nor pursue any other fact not presented to him by husband's counsel.

Applying this test to the record in this case requires a new trial as in **Wilson v. Manduca**. The basis of the trial court's judgment in this case was its conclusion regarding Mr. Nazarian's credibility. Its conclusion is not supported in the record. Obviously a conclusion as significant to a judgment (sic) as credibility has to have unfairly affected the trial judgment." (Appellant's Supplemental Opening Brief pp. 95-98)

At oral argument, counsel for Petitioner urged the Court of Appeal to reweigh all of the evidence including the Reporter's Transcript of testimony and reach an independent decision on each issue which he presented on appeal.

In his Petition to this Court, counsel for Petitioner states:

> "Petitioner tried to get the appellate court to examine the record to determine if there was any evidence supportive of the trial court's position. The appellate court declined. At oral argument the acting presiding Justice adamnently (sic) refused to look at the record."
> (Petition For A Writ of Certiorari, p. 14)

That statement is totally untrue. The acting presiding Justice stated that it was the Court's responsibility to "examine the record to determine if there was substantial evidence supportive of the trial court's position," but that it was not going to reweigh the evidence.

In **Estate of Teed** (1952) 112 C.A. 2d 638; 247 P.2d 54, the Court explained the "substantial evidence rule" as follows:

> "Since, according to the well-established rule as expressed in Estate of Teed, 25 Cal. 2d 520 (154 P.2d 384), hereinbefore mentioned, 'the power of the appellate court begins and ends with a determination of whether there is any substantial evidence to support the conclusion' that the testatrix was of unsound mind at the time of executing

the will in question, it becomes necessary to consider the meaning of the italicized word "substantial.' . . .

The sum total of the above definitions is that, if the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case."
112 C.A. 2d at pp.643, 644.

In **People v. Johnson** (1980) 26 Cal. 3d 557; 162 Cal. Rptr. 431, the California Supreme Court re-examined the "substantial evidence rule" in accordance with the principles of this Court as set forth in **Jackson v. Virginia** (1979) 443 U.S. 307; 99 S.Ct. 2781, 61 L.Ed 2 560 and, concluded that the "substantial evidence rule" as enunciated and applied by the California Courts complies with the requirements contained in **Jackson v. Virginia, supra.**

Justice Vallee in **Overton v. Vita-Food Corp.** (1949) 94 C.A. 2d 367; 210 P.2d 757 succinctly stated the substantial evidence rule as follows:

"Andre Gide once observed: 'Everything has been said already; but as no one listens, we must always begin again.' With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is any substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences taht may be drawn therefrom. No one seems to listen."
(94 C.A. 2d 370)

Petitioner is urging that the "substantial evidence" rule be discarded in this case and that this Court should independently review 857 pages of the Reporter's Transcript and 3157 pages of the Clerk's Transcript and make it own independent judgment after weighing all of the evidence.

The trier of fact is the exclusive judge of the credibility of the witnesses. **Maslow v. Maslow** (1958) 117 C.A.2d 237; 255 P.2d 65.

The rationale for that rule was set forth in that case as follows:

"The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression. Did plaintiff and her mother testify with the conviction and assurance compatible with truthfulness; or did either of them give testimony haltingly as though laboring under the handicap of apprehansion and uncertainty or did either of them give it glibly as though a tale learned by rote for the purposes of the courtroom? These are questions which can only be answered by the trier of fact. The court having seen and heard the parties may well have concluded that there was collusion; that the plaintiff's testimony was a fabric of fancy and exaggeration woven to lift her from bonds now distasteful; and that the testimony of plaintiff's mother was a recital of rehearsed evidence."

117 C.A. 2d at p. 243

JUDGE MARKEY had the opportunity to observe the parties and their witnesses during 9 full days and 9 partial days of trial and was obviously in a better position to judge their credibility than is any Appellate Court.

Upon what basis does Petitioner conclude that the Court of Appeals refused to examine the trial judge's findings?

Is it because the Court of Appeals affirmed the trial court's decision and remanded the case only for the purpose of making additional findings as to the jewelry?

Certainly nothing is contained in his Petition that indicates any other basis.

An examination of the opinion of the Court of Appeals appended as Appendix "A" to the Petition clearly discloses that the Court of Appeals did in fact review the record of the trial court proceedings and that record contains substantial evidence in support of the Trial Court's Findings of Fact.

III.

THIS COURT IS WITHOUT JURISDICTION TO DECIDE THE ISSUES RAISED BY THE PETITIONER.

As applied to the circumstances of this case, Title 28 U.S.C. § 1257(3) requires that in the state courts petitioner has "specially set up or claimed under the Constitution (of) the United States" the right which he now seeks to have this Court enforce.

Although a section of Appellant's Supplemental Opening Brief filed with the Court of Appeal of the State of California Second Appellate District was entitled "The Trial Court's Conflicts With Trial Counsel Deprived Mr. Nazarian of Due Process" nowhere in his briefs filed with the Court of Appeal is there any reference to the Fifth or Fourteenth Amendments of the United States Constitution, and there is not a single citation of any case relying on the due process clause of the Federal Constitution. All references are to Treatises on the subject of California law and to California cases.

Article 1, Section 13 of the California Constitution provides that "... no person shall... be deprived of life, liberty, or property without due process of law..."

Although Petitioner, in his Supplemental Opening Brief to the Court of Appeal of the State of California Second Appellate District, urged the Court to apply

"an exception to the substantial evidence rule" during its review of the trial court proceedings, he did not assert in his briefs or arguments to the Court of Appeal that the substantial evidence rule as applied by California Courts violated the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution.

Nowhere in his briefs to the Court of Appeal is there a single citation to a case relying upon the equal protection clause of the Federal Constitution.

Petitioner did in his Petition For Hearing to the Supreme Court of the State of California assert that the substantial evidence rule operated to deny him due process and equal protection of the law under the State and Federal Constitutions. However, the Supreme Court of the State of California denied a hearing and therefore did not rule on the federal issue, which petitioner attempted to raise for the first time.

Accordingly, the Petition For a Writ of Certiorari should be dismissed for want of jurisdiction. **Cardinale v. Louisiana** (1969) 394 U.S. 437; 89 S.Ct. 1163; **Webb v. Webb** (1981) 101 S.Ct. 1889.

CONCLUSION

Petitioner has failed to demonstrate that he was denied due process or equal protection of the laws in the trial court proceedings or the appellate proceedings and his Petition For a Writ of Certiorari should be denied. In the alternative the Petition For A Writ of Certiorari should be dismissed for lack of jurisdiction.

Respondent should be awarded her costs incurred in opposing the Petition.

Respectfully submitted,

_____

ROBERT L. WILSON
Attorney for Respondent.

APPENDIX "A"

FINDINGS OF FACT

1. That service of process was duly and legally made upon the Respondent, JOHN NAZAR NAZARIAN, on October 10, 1975, and Respondent appeared by way of a Response heretofore filed on November 6, 1975.

2. That Petitioner has been a resident of the State of California for six months immediately preceding the filing of the filing of the Petition of Dissolution; to wit, October 9, 1975.

3. That Petitioner has been a resident of the County of Los Angeles for a period in excess of three months immediately preceding the filing of the Petition of Dissolution; to wit, October 9, 1975.

4. That Petitioner and Respondent were married on November 22, 1969 and separated on October 12, 1975.

5. That irreconcilable differences have arisen between Petitioner and Respondent which have caused the irremediable breakdown of the marriage.

6. That there are two children born of said marriage; to wit, VARTAN NAZAR NAZARIAN, born June 4, 1970, age seven, and JOHN SAYAT NOVA NAZARIAN, born June 16, 1971, age six.

7. That it is for the best interests of the minor children, VARTAN NAZAR NAZARIAN and JOHN SAYAT NOVA NAZARIAN that custody of said minor children is awarded to Petitioner subject to rights of visitation by Respondent, in accordance with the visitation schedule recommended by the Court and agreed to by the parties.

8. That Respondent should pay to Petitioner as and for support of the minor children the sum of $125.00 per month per child for a total of $250.00 per month payable on the first and fifteenth day of each and every month, commencing June 15, 1977 and continuing on the first and fifteenth day of each successive month thereafter until further order of this Court, except that payment of support for each child shall terminate when that child dies, marries, becomes emancipated or attains the age of majority whichever first occurs.

9. That Petitioner is not in need of spousal support.

10. That Petitioner is in need of financial assistance toward the payment of her attorney's fees incurred to and including March 21, 1977 and Respondent has the ability to contribute to the payment of Petitioner's attorney's fees.

11. That the following debts listed on Respondent's Financial Declaration, Form 1285.50, dated November 2, 1976 and heretofore filed with the Court, to wit, Forest Lawn Mortuary $4,000.00;

Bank of America $7,200.00; Helen Babikian $8,000.00; Rosin Dorakian $2,500.00; Ardor Dorakian $1,000.00; and Armine Bochelian $2,000.00, are the separate obligations of Respondent.

12. That there exists a valid community obligation to NAZAR NAZARIAN in the amount of $9,000.00 which obligation was listed on Respondent's Financial Declaration Form 1285.50, dated November 2, 1976, in the amount of $12,000.00.

13. That pursuant to stipulation of the parties, the antique sword, the painting of a woman giving a wounded soldier water and the ancient brass plate are the separate property of the Respondent.

14. With the exception of the items referred to in paragraph 13 above, all of the remainder of the furnishings and furniture of the parties is community property. That pursuant to the stipulation of the parties, the furniture and furnishings of the parties is to be divided between them and a toss of a coin shall determine which party shall have the first choice of an item. The party having second choice will then have two choices and thereafter, the parties will alternate each taking one choice in turn until all items are disposed of.

15. The Court finds that on October 31, 1975, the Court made the following Order: That the Respondent shall continue to collect the rentals from the property of the parties hereto both separate and

community, and to pay the obligations and expenses of said property and to keep complete and accurate records of all income and expenditures. Further, both parties were ordered to continue the then existing plan towards the payment on the family home deductions for which were being made from each of the parties respective paychecks.

The Court further finds that in the accounting of the income received by the Respondent from the income producing property for the period from November 1, 1975 to and including December 31, 1976, the Respondent has improperly sought certain credits which credits are denied; to wit, the sum of $123.24 per month in connection with the 7th Avenue property which has been withheld from his salary pursuant to the prior court order and the sum of $355.67 per month in connection with the Crenshaw property which has been withheld from his salary pursuant to the prior court order.

16. That the rental income from the Vose Street property for the period of November, 1975 through December, 1976 was $3,220.00 and the total expenses including repairs, taxes, principal and interest payments were $2,957.00 with a resultant net income for the period of $263.00.

17. That the rental income from the Albany property for the period from November, 1975 through December, 1976 was $26,965.98 and the total

expenses including repairs, taxes, principal and interest were $21,930.84 with a resultant net income for the period of $5,035.14.

18. That the income from the Washington property for the period from November, 1975 through December, 1976 was $13,745.00 and the expenses including repairs, taxes, principal and interest, excluding the property taxes which were due and payable in December, 1976, were $11,747.00 with a resultant net income prior to payment of said taxes in the sum of $1,998.00. Respondent has the duty to pay said property taxes and any charges or penalties resulting rom nonpayment or late payment are to be charged against Respondent's account.

19. That the rental income from the 7th Avenue property for the period from November, 1975 through December, 1976 was $3,640.00 and the expenses which Respondent is entitled to charge against income for said period amount to $698.20 with a resultant net income of $2,941.20, excluding the property taxes which were due and payable in December, 1976. Respondent has failed to pay said property taxes. Respondent has the duty to pay said property taxes and any charges or penalties resulting from nonpayment or late payment are to be charged against Respondent's account.

20. That the rental income from the Crewshaw property for the period from November, 1975 through December, 1976 was $2,700.00 and the expenses which Respondent is entitled to charge against income for said period amount to $2,135.92, with a resultant net income of $565.08 excluding the property taxes which were due and payable on December, 1976. Respondent has failed to pay said property taxes. Respondent has the duty to pay said property taxes and any charges or penalties resulting from nonpayment or late payment are to be charged against Respondent's account.

21. That neither Petitioner nor Respondent is entitled to any reimbursement for funds expended on the community property.

22. The Court reserves jurisdiction to determine finaly all credits and/or charges as to the accounting for which Respondent is responsible with respect to the properties of the parties and the Court order of October 31, 1975. Said accounting will by necessity need to be current until all properties are sold and/or divided. Petitioner and Respondent shall continue the existing payments on the property which are withheld from their respective paychecks until the properties are sold and/or divided and neither Petitioner nor Respondent is entitled to reimbursement for said payments made or to be made. Respondent has had and continues to have the duty to make all payments, with the exception of

those payments withheld from Petitioner's paycheck, including real property taxes.

The excess of income over expenses is to be divided equally between the parties.

Any penalties or charges resulting from nonpayment or late payment are to be charged against Respondent's account.

Any monies received by Petitioner by way of receipts or royalties and any monies received by Respondent by way of receipts or royalties in connection with the parties' ownership of real property until the real property producing said receipts or royalties is sold or divided, is to be equally divided between the parties.

23. That Respondent's interest in a retirement account with the County of Los Angeles up to and including the date of separation and to the extent that Petitioner has participated in any such retirement plan at her place of employment up to the date of separation constitutes community property. The Court reserves jurisdiction to make such other and further orders as may be required to insure their equal division when appropriate.

24. That from the date of the marriage through April, 1976, Petitioner and Respondent filed joint state and federal income tax returns wherein the income and expenses attributable to all of the real property owned by the parties whether title was

held as in the name of Respondent alone, Petitioner and Respondent as joint tenants, or Petitioner and Respondent as community property, was reported.

25. That there never was any agreement, express or implied, between Petitioner and Respondent during the course of the marriage that in the event one of the parties used his or her separate property for community purposes, said party would be entitled to reimbursement from the community or separate property of the other for such expenditures.

26. That from the inception of the marriage both parties intended, and during the course of their marriage their respective conduct manifested their intentions, that their mutual efforts were to be represented by community holdings in the property owned or acquired.

27. That from the inception of the marriage and continuing throughout the course of the marriage the Respondent maintained control over the monies received by the parties from whatever source and likewise maintained control over all checking accounts maintained by the parties, to wit, the Nazarian Apartment account number 1223-0109 with Security National Bank, the John Nazarian/Kathleen Nazarian account, number 141-62-992, later changed to John Nazarian/Mary Ann Nazarian, account num-

ber 141-72-439 with Security Pacific National Bank; and the J.N. Nazarian Properties account number 357-1-00347 with Bank of America. The monies deposited into each of said accounts from the inception of the marriage and continuing throughout the duration of the marriage of the parties represented a mixture of community funds consisting of earnings, reimbursed expenses, rental income, borrowings, insurance proceeds, income tax refunds, and other advances.

28. The evidence introduced by the Respondent in connection with the deposits of funds into and the withdrawal of funds from each of said checking accounts was incomplete, inaccurate, and insufficient to identify any particular portions of the funds deposited into said accounts as derived from separate property sources and was insufficient to identify any particular withdrawals from said accounts as derived from separate property funds.

29. The Albany property was acquired in May, 1968 with a down payment of $10,000.00 toward a total purchase price of $95,000.00. Respondent borrowed $5,000.00 from his parents and $2,500.00 each from VERNON MOEN and HELEN BABIKIAN in order to make the $10,000.00 down payment. The balance of the purchase price was financed by a loan from Equitable Savings and Loan Association. The sum of $5,000.00 borrowed by Respon-

dent from his parents was regarded by Petitioner and Respondent as a community obligation and the Court finds that it is a community obligation.

The Respondent commenced making payments to VERNON MOEN and HELEN BABIKIAN on the $5,000.00 combined loan on June 27, 1969, in the sum of $100.00 per month principal and interest.

On August 25, 1969, HELEN BABIKIAN and VERNON MOEN gave to JEANNETTE JEANS, the daughter of HELEN BABIKIAN, and her husband, WILLIAM JEANNES, as a gift, the unpaid balance of said loan amounting to $4,786.26.

Thereaftr payments were made to JEANETTE and WILLIAM JEANS in the sum of $100.00 per month in repayment of said loan and the final payment on said loan was made on August 16, 1974. Said payments were made by checks drawn on the Nazarian Apartment account #1223-0109 with Security National Bank until on or about September, 1973 and thereafter by checks drawn on the J.N. Nazarian Properties account #0357-1-00347 with Bank of America until said loan was paid in full.

Payments on the loan from Equitable Savings and Loan Association were made by checks payable to Equitable Savings and Loan Association and then to Great Western Savings and Loan Association which acquired Equitable Savings and Loan

Association and drawn on the Nazarian Apartments checking account #1223-0109 with Security National Bank and later by checks drawn on the J.N. Nazarian properties account #0357-1-00347 with Bank of America.

30. The Respondent by warranty deed dated September 20, 1968, acquired a 40-acre parcel of property in Alaska described as "The land embraced in U.S. Survey No. 3003, also within Section 21, Township 4 South, Range 10 West, Seward Meridian, Homer Recording District, State of Alaska" for the sum of $3,500.00 which sum was borrowed by Respondent from his parents. The sum of $3,500.00 borrowed by Respondent from his parents was regarded by Petitioner and Respondent as a community obligation and the Court finds that it is a community obligation.

31. On September 24, 1968, Respondent received a Quit-Claim Deed to the property described as "Lot 3, U.S. Survey Number 4725, said lot containing 79.32 acres, according to the official plat thereof on file in the fofice of the recorder for the Homer Recording District, Homer, Alaska" from HOWARD K. TERRY upon payment of the sum of $1,500.00. At that time no patent had been issued by the United States of America with respect to said land. Respondent borrowed the sum of $1,500.00 to make said payment from his parents. The sum of $1,500.00 borrowed by Respondent from his parents

was regarded by Petitioner and Respondent as a community obligation and the Court finds that it is a community obligation.

In connection with said transaction with HOWARD K. TERRY, Respondent agreed to pay to HOWARD K. TERRY the additional sum of $2,500.00 for the purchase of said property payable at the rate of $100.00 per month commencing ten days after the issuance of a patent by the United States of America to HOWARD K. TERRY for said property.

On March 13, 1972, the United States of America issued a patent to said property in the name of HOWARD KEITH TERRY.

Thereafter, payments in the total sum of $2,500.00 were made to HOWARD TERRY by checks drawn on the account of Nazarian Apartments #1223-0109 with Security National Bank and later by checks drawn on the J.N. Nazarian Properties account #0357-1-00347 with Bank of America.

32. That the property described as: "The land embraced in U.S. Survey No. 3003, also within Section 21, Township 4 South Range 10 West, Seward Meridian, Homer Recording District, State of Alaska" consisting of 40 acres is the separate property of the Respondent.

33. The Court has been presented with the following items for determination as to their character as community or separate property, and finds that said items are community property;

PROPERTY

(a) 79.32 acre parcel of property in Alaska described as: "Lot 3, U.S. Survey Number 4725, said lot containing 79.32 acres, according to the official plat thereof on file in the office of the recorder for the Homer Recording District, Homer, Alaska."

(b) Real property described as 1016-1024 Albany St., Los Angeles, Calif.

(c) Real property described as 14619 Vose Street, Van Nuys, California.

(d) Real property described as 3700-3710 West Washington Blvd., Los Angeles, Calif.

(e) Real property described as 1911 Seventh Ave., Los Angeles, Calif.

(f) Real property described as 1628 Crenshaw Blvd., Los Angeles, CA.

PROPERTY:

(g) Real property described as 5826 W. Olympic Blvd., Los Angeles, CA.

(h) Real property described as the Southeast quarter of Sec. 17, Township 15 North, Range 18, West of the Gila and Salt River Base and Meridian, Mahone County, Arizona.

(i) 1970 Jeep of a value of $2,000.00.

(j) 1964 Ford Pickup

(k) 1966 Chrysler Stationwagon

(l) Balance in Trust Account of Robert L. Wilson
(m) Savings Accounts with Glendale Federal Savings and Loan Association.

The aforesaid community property shall be equally divided between the Petitioner and Respondent subject to previous credits and/or charges.

34. That hostilities have existed between Petitioner and Respondent herein and that it would be to the mutual benefit of the parties hereto that they each be mutually restrained and enjoined from annoying, harassing or molesting each other in any manner whatsoever.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over hte age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, California 92701.

On September 9, 1981, I served the within Opposition for Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of four (4) sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

The California Supreme Court, 2nd Floor, 3580 Wilshire Blvd., Los Angeles, California 90010.

The Court of Appeals for the Second Appellate District, 3rd Floor, 3580 Wilshire Blvd., Los Angeles, California 90010.

The Clerk of the Superior Court for the County of Los Angeles, 111 North Hill Street, Los Angeles, California 90012.

James R. Goff, 1002 North Broadway, Santa Ana, California 92701..

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on September 9, 1981, at Santa Ana, California.

_____

Jack Gallagher